Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: No EA/2007/0136
Information Commissioner's Ref: FS50150138

Freedom of Information Act 2000 (FOIA)

Appeal heard on 30th. July, 2008
Decision Promulgated 8th August, 2008

BEFORE

DEPUTY CHAIRMAN
D.J. Farrer Q.C.
and
LAY MEMBERS
Jacqueline Blake
and
Marion Saunders

BETWEEN:

MR J CALLAND

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE FINANCIAL SERVICES AUTHORITY

Additional Party

Representation:

The Appellant appeared in person with his wife, Christine Calland
For the Commissioner ("the IC") : Anya Proops
For the Financial Services Authority ("the FSA") : Timothy Pitt–Payne

Decision

1 The Tribunal dismisses this appeal.

Background

2 Between 1988, when pensions legislation introduced major changes regarding occupational pensions and 1994, large numbers of private pension plans were sold to people who could have remained in or joined occupational pension schemes. In many cases they were mis-sold, that is to say, sold to those who would have been better off in an occupational scheme but were not properly advised by the seller as to the risks of leaving or not joining such a scheme or of transferring benefits from such a scheme to a personal pension plan.

3 In the mid – 1990s, the Personal Investment Authority ("the PIA."), the FSA `s predecessor as regulator of Independent Financial Advisors ("IFAs") selling pensions, undertook a review of apparent mis – selling which was continued by the FSA following its creation in 2001. The Financial Services Compensation Scheme ("the FSCS") paid compensation to victims of mis – selling where it could not be recovered from the IFA. The Financial Ombudsman Service ("the FOS") had jurisdiction to receive and adjudicate on complaints and, within the U.K., enforce awards made against IFAs.

4 The Appellant[1] practised for some years as an advisor in the financial services industry under the style "Calland Insurance and Mortgage Services ("CIMS")" and sold many pension plans. In December,1997, approaching retirement, he formed a very brief partnership with his son but

[1] The formal title is adopted to avoid confusion with his son, who has exactly the same name.

transferred the business to him early the following year and retired. It follows that the Appellant` s business was regulated until transfer by the PIA but never by the FSA. His son succeeded as sole proprietor. In 2000 the son was made bankrupt.

5 Before retirement, the Appellant conducted a review of pensions that he had sold, as required by the PIA. Following his retirement, the FSA , in the course of the continuing review, contacted a number of his former clients to whom, it thought, pensions had been wrongly sold, quantifying the value of possible claims and advising them to approach the FOS. Difficulties of enforcement were foreseen, however, since the Appellant was, by then, living in Spain.

6 As noted above, the Appellant was not subject to regulation by the FSA. and was under no specific obligation, therefore, to respond to its inquiries[2]. The FSCS failed to obtain financial information from him, apparently because he did not see why he should answer questions as to his ability to meet claims, the validity of which had not been established. It is right to add that, as early as 2002, an investigator at the FSA noted that he "had done nothing wrong" and seemed ready to recommend that any further scrutiny of claims against him be abandoned.

7 Between 2002 and the date of the request which gives rise to this appeal there ensued a voluminous correspondence involving the Appellant, investigators at the FSA, representatives of the FSCS and of the FOS. Rightly or wrongly, the Appellant thought that he was being unfairly hounded in respect of claims which had not been verified by the FSA nor pursued by the clients. He believed that the different authorities were, at best, confused as to his role in CIMS. On one occasion, in March 2005, he recorded and transcribed a telephone conversation with Mr. Sidonio, an FSA investigator, the content of which rather suggests that, after several

[2] The FSA has powers under FSMA s.219 to require a person who is not regulated to provide information but, for reasons immaterial to this Decision, evidently did not consider that they were available here.

years scrutiny of the Appellant `s pension – selling record, FSA staff were not fully familiar with the history of the matter.

8 In answer to questions from the Tribunal, it emerged, as we had begun to suspect, that the only body with power to make adjudications in this case was the FOS, to which cases were referred only at a late stage and which had understandable doubts as to its powers to enforce any award against a Spanish resident like the Appellant. The upshot was that a great deal of time had passed with no sign of progress. There was no finding as to whether pensions had been mis – sold to clients of CIMS, yet the Appellant received repeated inquiries as to his ability to satisfy unproven liabilities which he denied. The regulator was, it seems, not empowered to regulate. It seems odd, moreover, that the jurisdiction of the PIA over an IFA, who retired before 2001 in respect of business conducted before 2001 was not transferred to the FSA under the provisions of the Financial Services and Markets Act, 2000 ("FSMA").

9 For whatever reasons, the regrettable reality was that by November, 2005 and indeed still today, not one potential claim had been determined nor had any investigation been concluded or abandoned. Investigations as to the merits of each case had apparently not progressed beyond the stage of answers to standard questionnaires.

10 We have given only the briefest summary of the history contained in a wealth of documents which were exhibited to the Appellant `s case. As will become plain, we do not think that they are material to the quite narrow issues that we have to determine. Nevertheless, they help to explain why the request for information was made and why this appeal has been prosecuted with the vigour which we have witnessed. Therefore, whilst we have no hesitation in ruling that the issues for determination are much more limited than the Appellant contended in his written submissions, we do not criticise the breadth of his initial assault on this appeal.

11 It is not for this Tribunal to rule on the merits of the Appellant `s complaints as to his treatment by the public bodies that feature in this case, other than the refusal of his request for information. Nor are we concerned with the merits of any claims against him for alleged mis - selling. The FSA, rightly in our view, did not engage in arguing these issues on the ground that they were not relevant to our determination. However, whatever the rights and wrongs of these matters, it is obvious to the Tribunal that the Appellant, faced with allegations that are still unresolved, has been subject to considerable stress over a long period and we have borne this in mind when faced with a great deal of evidence, which was at best, only marginally relevant to our task. We further wish to record that, whatever the strength of their feelings on the matter, the Appellant and his wife conducted this appeal with restraint, moderation, courtesy and skill.

12 The Request

The request was made by letter of 23rd. February, 2006 and covered :

"full copies of all correspondence and communications (internal and external) held by the FSA appertaining to all claims against me (CIMS) that the FSA have invited and/or received and processed, including all files relating to these claims that have been passed on to [the Financial Services Compensation Scheme] and [the FOS]. This information to include all inter-agency communication that assists the actioning of these claims against me."

13 The FSA considered that the request raised issues not only under FOIA but also under the Data Protection Act, 1998 ("DPA"). DPA considerations are, of course imported into the response via FOIA section 40 . Summarising its reply, from March to May, 2006, in three batches, it provided a great deal of material, as to which the Appellant was the data subject, together with redacted letters, where personal data of former clients in the form of contact details were involved.

14 It withheld a relatively small collection of documents, amounting to sixty – seven pages, of which about one half were the letters referred to above, to the redacted parts of which s.40 was said to apply. It invoked s.42 (legal privilege ("LPP")) to justify withholding most of the other documents, claiming that the public interest favoured respect for that privilege. In a few cases, s.42 was relied on only in respect of short passages in documents which were supplied in redacted form. Section 44 was relied on as to two passages in one document. There were eventually only eleven documents as to which s. 42 and / or s.44 issues arose for determination.

15 The Appellant sought a review which took some time and was accompanied by a considerable amount of correspondence. In the course of that review, the FSA retrieved from the FOS, to which files had been sent, a further, very substantial body of material amounting to about two thousand pages. The refusal as to the previously withheld material was maintained.

16 The Complaint to the Commissioner

The Appellant complained to the IC on 9th. November, 2006. The IC obtained from the FSA copies of the withheld documents, which formed the "closed bundle" for the hearing of the appeal.[3]

17 The Decision Notice

The IC upheld the FSA `s refusal and confirmed the exemptions relied on. He concluded that the FSA was right to conclude that the balance of the public interest lay in maintaining privilege where s. 42 was engaged. From that decision the Appellant appealed.

18 The evidence

[3] A redacted version of the same bundle was included in the "open" evidence.

With the consent of the other parties, the presentation of this appeal was shared between the Appellant and Mrs. Calland. The Appellant gave evidence quite briefly and was not cross examined. He put in statements confirming his integrity and reputation and one from Jane Sanders, formerly of FOS, which last did not really further the case.

19 He also applied to summons witnesses who had not consented to give evidence. For some time before the hearing he had made such requests to the Tribunal, which had indicated that it was not persuaded that they should issue but would hear final representations at the start of the hearing.

20 At the hearing the Appellant indicated that his applications had been reduced to three, namely for Domenic Sidonio of the FSA and Loretta Minghella and Mark Thomas of the FSCS. So far as material, Rule 18 of the Information Tribunal (Enforcement of Appeals) Rules, 2005 provides :

18. - (1) Subject to paragraph (2) below, the Tribunal may by summons require any person in the United Kingdom to attend as a witness at a hearing of an appeal at such time and place as may be specified in the summons and, subject to rule 27(2) and (3) below, at the hearing to answer any questions or produce any documents in his custody or under his control <u>which relate to any matter in question in the appeal.</u>

The underlined words apply the critical test of relevance.

21 Mr. Sidonio was to be summoned to deal with the content of letters to clients which he signed and which were said to contain misstatements. The two FSCS officers were alleged to be involved in collusion with the FSA, of which they could give evidence. We concluded that none of these matters " related to any matter in question in the appeal" and refused to issue summonses.

22 The FSA called Joel Scott, a Team Leader in the FSA Information Access Team. He was cross examined by the Appellant and also tendered a statement in the closed session.

23 We received submissions from the FSA in closed session, particularly answering questions from the Tribunal as to whether s.42 and s.44 were engaged in respect of a small number of documents. We also read a statement from Mr. Scott, which did not to any significant degree develop the evidence read and heard in open session. We received from him answers to a number of routine questions. To this Decision is annexed a short closed section dealing with the matters of detail which emerged in that phase of the hearing.

24 In addition we received a very large volume of material exhibited by the Appellant, as already indicated, covering the history of the matter and the correspondence between the parties. We read it but concluded that much of it did not relate to the issues which we had to determine.

25 The Issues

Neither the IC nor this Tribunal is concerned with anything beyond the Appellant `s request for information quoted above.

26 In the course of the hearing it became clear that there was no longer an issue as to the application of s.40(2) to the letters, since the contact details were plainly personal data of the clients and their disclosure would undoubtedly infringe the first and second data protection principles. Accordingly, since this is an absolute exemption, no further consideration of this exemption is needed. Disclosure of contact details would have been of no legitimate interest to anyone anyway, though we recognise, of course, that that is not the relevant test.

27 That leaves four outstanding questions :

(i) As to all but one of the wholly – withheld documents, are they communications which attract LPP, so as to engage s. 42 ?[4]

(ii) If section 42 is engaged, is it shown that the public interest in maintaining LPP is greater than the public interest in disclosing the material documents ?

(iii) As to the remaining document, does s. 44 apply so as to require that it be withheld ?

(iv) Has the FSA revealed to the Appellant or to the Tribunal all the information covered by the request of which it is aware or is it concealing relevant documents ?

28 We received copious submissions from all sides on these matters and, from the Appellant, on matters that we have ruled irrelevant to our decision. There was no significant divergence between the IC and the FSA in the largely complementary arguments presented to us. The written and oral submissions made to us by the Appellant and Mrs. Calland were directed principally to questions (ii) and (iv), though he raised a significant issue as to the extent of LPP, with which we deal in the next section.

29 Reasons for our Decision

The withheld documents (twenty – four pages) for which LPP was claimed, wholly or in part, were file notes made by FSA lawyers and communications, generally by e mail, between FSA investigators and lawyers or lawyers and other lawyers. Having considered them and the closed submissions made by the IC, we concluded that they were

[4] The relevant text is:

42. - (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

privileged, subject to the broad question of principle raised by the Appellant, namely ; does the privilege extend to communications with in – house lawyers or is it restricted to advice sought or obtained from independent external solicitors or barristers ?

30 The Appellant, in a skeleton argument, referred to an authority of the European Court of Justice which, he submitted, recognised that distinction. The researches of the IC revealed that the authority that the Appellant had in mind was probably *Akzo Nobel Chemicals and Acros Chemicals Limited v Commission of the European Communities (CFI :T - 125/03 and T = 253/03* 17th. September, 2007) ("Akzo"), a decision of the European Court of First Instance . We are indeed unaware of any other relevant to this issue.

31 Akzo concerned the exercise of the Commission `s powers under Article 14(3) of Regulation 17 of 6th. February, 1962, First Council Regulation, implementing Articles 81 and 82 of the Treaty of the European Communities relating to the exposure of anti – competitive practices. It followed *AM & S (Europe) Limited v Commission of the European Communities (1982) ECR 1575,* which related to the exercise of the same power. Paragraphs 21 and 24 of the report of AM & S appear to adopt a restrictive view of LPP as recognised in some member states, requiring that the lawyer be independent of the client seeking advice and not, therefore, employed by it.

32 However, the reasons given for that restriction do not apply to employed solicitors or barristers here, since they remain in large measure subject to the same codes of conduct of their professional bodies as their independent counterparts and, in particular, owe the same duties to the court. Paragraph 19 of the AM & S judgment recognised the variations in scope of LPP in different member states.

33 Moreover, both AM & S and Akzo were concerned with the interpretation of Article 14(3), not the requisite conditions for LPP in the domestic law

of the UK. There was found to be an especially pressing need to limit LPP in cases where the paramount need to expose anti – competitive practices was involved. Paragraph 16 of AM & S appears to decide that the proper construction of Article 14(3) requires that the whole principle of LPP be overridden in this context.

34 We conclude that these authorities do not limit the general scope of LPP to communications with external, or independent lawyers. but concern possible inroads upon the principle enacted specifically in relation to the exercise of Commission powers under Article 14(3). A counterpart to such a specific statutory incursion is to be found in FOIA s. 42 itself.

35 Such a result accords with the general policy giving rise to LPP. Just the same requirements for confidentiality and candour exist where an employed lawyer gives advice as when it comes from a member of the independent professions.

36 We therefore reject this argument and rule that s. 42 is engaged. Since s.42 provides for a qualified exemption, we proceed to consider the question of the balance of the public interest.

37 The general public interest in disclosure of communications within public authorities has been referred to, usually under the headings of "transparency" and "informing the public debate", in a number of decisions of this Tribunal. What is quite plain, from a series of decisions beginning with *Bellamy v IC EA/2005/0023* , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential. The Appellant `s argument for disclosure tended to confuse the undoubted public interest in the proper discharge of their public responsibilities by the FSA, the FSCS and the FSO with the much more limited interest in disclosure of FSA communications subject to LPP. Neither general submissions as to impropriety by the FSA nor an examination of the small

number of documents involved indicated any significant public interest in disclosure sufficient to outweigh the normal interest in protection of LPP.

38 The possible application of s.44 is very limited but nevertheless important. It relates to two paragraphs of an e mail, the rest of which is covered by s.42. Section 44, so far as material, reads :

1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-
(a) is prohibited by or under any enactment . . . . .

39 It is said that disclosure of the two paragraphs would involve a violation of FSMA s.348 which, as relevant, provides :

Restrictions on disclosure of confidential information by Authority etc.

348. -(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of-

(a) the person from whom the primary recipient obtained the information; and

(b) if different, the person to whom it relates.

(2) In this Part "confidential information" means information which-

(a) relates to the business or other affairs of any person;

(b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and

(c) is not prevented from being confidential information by subsection(4).

(3) It is immaterial for the purposes of subsection (2)

whether or not the information was received-

(a) by virtue of a requirement to provide it imposed by or under this Act;

(b) for other purposes as well as purposes mentioned in that subsection.

. . . . . .

40 The primary recipient here was the FSA which recorded information received from the FSCS as to the course of conduct. which the FSCS might adopt.. Was that "confidential information" as defined in subsection (2) ? The question is whether it related "to the business or other affairs of any person". It was accepted by the FSA that the only such person could be the FSCS.

41 We were initially inclined to doubt whether the FSCS, a scheme created by statute to assist in the compensation of investors, was truly a person for this purpose, since the obvious intention of s.348 was to protect independent companies which, voluntarily or under compulsion, provided confidential information to the regulator. However, not without some hesitation, we conclude that the FSA is correct in its submission that that is too narrow a view, that the plain terms of the section import no such limitation and that, in the absence of consent from the FSCS, there is some reason to protect from disclosure by the FSA information as to the internal workings of such a statutory scheme. Whether such information would be disclosable following a FOIA request is quite another matter.

42 Since s.44 provides an absolute exemption, no public interest issue arises.

43 We turn finally and briefly to the allegation that the FSA has withheld information covered by the request. Mr. Scott gave evidence as to the methods adopted within the FSA to retrieve relevant material and, subsequently, the recovery of a large volume of documents from the FSCS.

We saw and heard him cross examined. There is no evidence whatever to suggest a concealment of information, rather the reverse. We have no hesitation in rejecting this possibility.

44 Our Decision

For the reasons set out above and developed, to a very limited degree, in the closed annex, we uphold the IC`s decision and dismiss this appeal.

Signed:

David Farrer Q.C.
Deputy Chairman
8th August, 2008